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In the Supreme Court of the United States

OCTOBER TERM, 1977

THE UNIVERSITY OF CHICAGO AND ARGONNE,
PETITIONER

v.

LOUIS ALLEN MCDANIEL, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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This brief is filed pursuant to the Court's invitation to the Solicitor General to state the views of the United States.

OPINIONS BELOW

The opinion of the court of appeals on remand (Pet. App. B, pp. A2-A12) is reported at 548 F. 2d 689. The initial opinion of the court of appeals (Pet.

App. E, pp. A15-A22) is reported at 512 F. 2d 583. The opinion of the district court (Pet. App. F, pp. A23-A27) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 21, 1977. The petition for a writ of certiorari was filed on April 21, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The United States will discuss the following questions:

1. Whether a federal district court has jurisdiction over a nondiversity action for damages of less than $10,000, based upon a laborer's claim that the private employer for whom he performed services in connection with a government contract paid him at a lesser rate than was specified in the contract.

2. Whether a laborer who has performed services for a private employer in connection with a government contract that does not specify payment of the prevailing wage, as determined by the Secretary of Labor under the Davis Bacon Act, states a cause of action against the employer by alleging that the contract's failure to specify payment of the prevailing wage violated the Davis Bacon Act and that in fact he was paid less than the prevailing wage.

STATUTES INVOLVED

Sections 1 and 3 of the Davis Bacon Act, 46 Stat. 1494, as amended and added, 40 U.S.C. 276a and

276a-2, are set forth at Pet. App. G, pp. A-28-A31.

Section 1 of the Miller Act, 49 Stat. 793, as amended, 40 U.S.C. 270a, is set forth at Pet. App. G, pp. A31-A33.

Section 2(b) of the Miller Act, 49 Stat. 794, as amended, 40 U.S.C. 270b(b), provides:

> Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit.

STATEMENT

1. The Davis Bacon Act, 46 Stat. 1494, as amended, 40 U.S.C. 276a *et seq.*, requires that all federal contracts in excess of $2,000 for "construction, alteration, and/or repair * * * of public buildings or public works" contain a provision obligating the contractor to pay laborers and mechanics employed thereon not less than the wages prevailing in the locality, as determined by the Secretary of Labor, 40 U.S.C. 276a.[1] The contracting officer is authorized to with-

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[1] If the contracting agency (here, the former United States Atomic Energy Commission, now the Department of Energy;

hold from the contractor a sum sufficient to reimburse the laborers and mechanics for any difference between the wages they actually receive and the locally prevailing wages as determined by the Secretary. 40 U.S.C. 276a.[2] The Comptroller General uses the withheld funds to make necessary reimbursements directly to the covered employees. 40 U.S.C. 276a-2(a).

If the funds withheld are insufficient to make reimbursements in full, laborers and mechanics have the same right of action against the contractor and his sureties as that conferred by the Miller Act, 49 Stat.

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see note 3, *infra*) determines that a proposed contract is subject to the Davis Bacon Act, a wage determination is requested from the Wage and Hour Division of the Department of Labor. (In areas such as Chicago, where there is significant continuing federal construction, the Department of Labor has published wage determinations in the Federal Register that are not tied to any specific contract proposals.) The wage determination is made part of the specifications contained in the request for bids and subsequently is incorporated into the contract.

Contracts governed by the Act provide that any disputes concerning the proper classification of laborers and mechanics or the applicability of the labor provisions of the contract are to be referred to the Secretary of Labor for final determination (41 C.F.R. 9-18.703-1(i)). If the contracting agency has any question regarding the interpretation or application of the Act, such questions may be referred to the Secretary of Labor. There is then a right of appeal to the Wage Appeals Board. See generally Reorganization Plan No. 14 of 1950, 5 U.S.C. App.; 29 C.F.R. 1.1 to 1.16, 5.1 *et seq.*, 7.1 *et seq.*

[2] The Act in addition provides administrative penalties for failure to pay the specified minimum wages, including termination of the contract (40 U.S.C. 276a-1) and debarment of the contractor from future contract awards for a three-year period (40 U.S.C. 276a-2).

793, as amended, 40 U.S.C. 270a *et seq.*, upon persons furnishing labor and materials (40 U.S.C. 276a-2(b)). The Miller Act requires any person entering into a contract exceeding $2,000 for the "construction, alteration, or repair of any public building or public work of the United States" to furnish certain bonds to the United States, including a payment bond for the protection of persons supplying labor or material for use in the contract work (40 U.S.C. 270a (2)). Suits on these bonds may be brought by any person who has furnished labor or material in the performance of the contract and has not been paid in full within a specified time (40 U.S.C. 270(b)(a)).

2. Argonne National Laboratory, a government-owned research and development facility, is operated by the University of Chicago pursuant to a contract with the Department of Energy.[3] The operating contract bars the University from performing construction work of a kind subject to the Davis Bacon Act, and accordingly it contains no requirement that prevailing wages be paid to laborers and mechanics or that a "Miller Act" bond be furnished (see Appendix A, *infra*, pp. 1a-3a). Instead, the contract requires that any construction work be performed under sub-

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[3] The contract was negotiated by the Atomic Energy Commission. The Energy Research and Development Agency ("ERDA") succeeded to the research and development functions of the Atomic Energy Commission in accordance with the Energy Reorganization Act of 1974, 88 Stat. 1233, 42 U.S.C. (Supp. V) 5801 *et seq.* ERDA's functions were transferred to the Department of Energy by the Act of August 4, 1977, Pub. L. 95-91, 91 Stat. 565, Section 301(a).

contracts containing appropriate prevailing-wage provisions and bond requirements (*ibid.*).[4]

Respondent Louis Allen McDaniel, Jr., brought this action for damages in the United States District Court for the Northern District of Illinois, alleging that he represents a class consisting of all mechanics and laborers employed on construction work under the contract for operation of Argonne National Laboratory, that the members of the class have been paid less than the prevailing wages required to be paid by the contract specifications and the Davis Bacon Act, and that the resultant injury to the class exceeds five million dollars. See Complaint, ¶¶ II-IV, pp. 1-3.[5] Jurisdiction was invoked under 28 U.S.C. 1331 and 1337 and the Davis Bacon Act (*id.* at 1).

The district court dismissed the complaint on the ground that the Davis Bacon Act does not authorize a

[4] Determinations concerning the applicability of the Davis Bacon Act to specific types of work are made pursuant to ERDA regulations approved by the Department of Labor (see, *e.g.*, 41 C.F.R. 9-18.701, 9-18.704, 9-18.750).

[5] Although Argonne National Laboratory was named as a defendant, it has no independent legal existence. Respondent has suggested (Memorandum of Law in Opposition to Defendant's Motion to Dismiss, p. 2 n. 1) that he intended in his complaint to identify Argonne Universities Association, one of the parties to the contract between the University of Chicago and the government. There is, in any event, no allegation in the complaint that Argonne has breached any duty to plaintiff, and thus its role in this litigation is at most purely nominal. If the Argonne Universities Association is a party, it has not petitioned for certiorari, and thus is technically a respondent in this Court. For the sake of convenience, however, we use the term "respondent" to refer only to the plaintiff McDaniel.

private right of action by laborers and mechanics against a contractor except on the "Miller Act" bond, stating (Pet. App. F, p. A26):

> [T]here is no way to avoid the thrust of the statute's language and legislative history in delimiting the right of action to one which Congress felt would be adequate to protect employees whose contractors failed to pay them the wages prescribed by the statute.

The court of appeals reversed and remanded (Pet. App. E). The court agreed with the district court that the Davis Bacon Act does not by its terms create a private cause of action (Pet. App. E, pp. A18-A19). However, the court reasoned that the contractual provisions required by the Act create rights for the benefit of the employees, and that those rights may be enforced in civil actions in federal courts otherwise possessing jurisdiction; the court found the requisite jurisdiction here under 28 U.S.C. 1337 (Pet. App. E, pp. A20-A21).[6]

The University of Chicago petitioned for a writ of certiorari, and this Court granted the petition, va-

[6] 28 U.S.C. 1337 provides in pertinent part:

> The district courts shall have original jurisdiction of any civil action * * * arising under any Act of Congress regulating commerce * * *.

The court of appeals rejected respondent's attempt to invoke jurisdiction under 28 U.S.C. 1331, because the complaint did not show that any individual's damages exceeded $10,000 (Pet. App. E, p. A22, n. 5).

cated the court of appeals' judgment, and remanded the case for further consideration in light of *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, and *Cort* v. *Ash*, 422 U.S. 66 (423 U.S. 810; Pet. App. A, p. A1).

On remand, the court of appeals reaffirmed its earlier decision. After considering the four factors enunciated in *Cort* v. *Ash*, *supra*, 422 U.S. at 78, the court of appeals concluded that laborers and mechanics are the "especial" beneficiaries of the Davis Bacon Act (Pet. App. B, pp. A7-A9); that the Portal-to-Portal Act of 1947, 61 Stat. 84, as amended, 29 U.S.C. 251 *et seq.*, read *in pari materia* with the Davis Bacon Act, evidences congressional recognition of a right of laborers and mechanics to sue in federal courts as third party beneficiaries of the contract provisions required by the latter Act (Pet. App. B, pp. A9-A10); that an implied private right of action is consistent with the congressional purpose underlying the Davis Bacon Act (Pet. App. B, pp. A10-A11); and that an action in federal rather than state court is appropriate since "the right to recover the unpaid portion of the prevailing wages is based on the congressional choice of a federal policy" (Pet. App. B, p. A11). The court remanded the case to the district court for consideration of the merits of respondent's claim, but the court's mandate has been stayed pending this Court's disposition of the instant petition for a writ of certiorari (Pet. App. D, p. A14).

DISCUSSION

This case arises on petitioner's motion to dismiss. Petitioner has not yet answered respondent's complaint (see Fed. R. Civ. P. 12(b)) and thus has not yet controverted his allegations concerning the contract terms. Instead, by its motion to dismiss, petitioner invited the district court to treat all the well pleaded allegations of the complaint as true. See, *e.g.*, *Miree* v. *DeKalb County*, No. 76-607, decided June 21, 1977, slip op. 2, n. 2.

The complaint is susceptible to two different, and mutually exclusive, readings. First, the complaint may be read as alleging that the contract between the government and the University of Chicago contained provisions requiring payment of prevailing wages to laborers and mechanics and that petitioner's failure to pay respondent such wages therefore constituted a breach of a contract of which he was a third party beneficiary (see Complaint, pp. 2, 6, 10). Alternatively, the complaint may be read as alleging that under the Davis Bacon Act the contract was required to include such provisions, and that their omission from the contract constituted a violation of the Act for which respondent was entitled to relief in the form of money damages (see Complaint, p. 2 and Counts III-IV). In our view, under either reading of the complaint petitioner's motion to dismiss should have been granted.

1. The decision of the court of appeals is premised upon the assumption that the first of these two pos-

sible readings of the complaint is correct. The court stated (Pet. App. B, p. A12; emphasis in original):

> [Respondent] allege[s] that the government contract with [petitioner] *did* contain the prevailing wage requirement, and [petitioner] does not deny it. * * * Assuming the facts alleged, the contractor in this case has been unjustly enriched by contracting on the basis of prevailing wage costs, while in fact paying less than the prevailing wage.

Reading the complaint in this light, however, the court's conclusion, "that implying a private right of action in the Davis-Bacon Act is necessary to effectuate the intention of Congress in passing the statute" (*ibid.*), is a *non sequitur*. The complaint so read makes out a claim not under the statute, which has not been violated according to that reading,[7] but under the contract itself. In other words, insofar as respondent alleges that the contract requires payment to him of an amount that he has not yet been paid, his claim is one sounding purely in contract, based

[7] The Davis Bacon Act requires only that contracts for government construction work contain the specified terms. See 40 U.S.C. 276a. If the complaint alleges that the contract does contain those terms, it cannot allege that the Act was violated. The contracting officer may terminate performance of the contract if the wages required by the contract are not paid (40 U.S.C. 276a-1). The complaint does not, however, charge a failure by the contracting officer or agency to terminate the contract, nor does it charge that any federal officer or agency injured respondent in any way.

upon the theory that he was a third-party beneficiary.[8]

Such a claim raises no issue concerning whether Congress established a cause of action, enforceable in a private suit, based upon violations of the Davis Bacon Act. At most, it would present the question whether federal or state common law principles govern the implication of third party rights under a federal contract. Cf. *Miree* v. *DeKalb County*, *supra*, slip. op. 3-8; *Wallis* v. *Pan American Petroleum Corporation*, 384 U.S. 63, 68. But under either view of that question, the federal courts would appear to lack jurisdiction to adjudicate respondent's claim.

Since there is no allegation here of a diversity of citizenship, the absence of federal jurisdiction would be clear if state law determined the scope of third-party rights. But the same result would follow even if federal law controlled. An action based upon the contract, rather than directly upon the Davis Bacon Act, would not be one "arising under any Act of Congress regulating commerce" within the meaning of 28 U.S.C. 1337. Such an action might be said to arise under federal common law and therefore "under the * * * laws * * * of the United States," 28 U.S.C. 1331. But cf. *Phillips Petroleum Co.* v. *Texaco Inc.*, 415 U.S. 125.[9] In any event, the complaint in this

[8] Such a claim would appear to be cognizable in a state court. See *Fata* v. *Healy Co.*, 289 N.Y. 401, 46 N.E. 2d 339; cf. *Bodrick* v. *Mayfair Construction Corp.*, 38 N.Y. 2d 926, 346 N.E. 2d 820.

[9] An employee's claim that he is not being paid the wages specified in his employer's federal contract might also raise a

case fails to satisfy the amount-in-controversy requirement of 28 U.S.C. 1331.[10] The complaint states only that the injury to the entire plaintiff class "is in excess of Five Million Dollars" (Complaint, p. 3). As the court of appeals noted (Pet. App. E, p. A22 n. 5), the claims of the class may not be accumulated to meet the jurisdictional requirement of 28 U.S.C. 1331. The general allegation in the complaint is deficient, for it "give[s] no indication that the amount in controversy with respect to the claim of any single plaintiff exceeds the jurisdictional amount." *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583, 589.[11] Accordingly, if the complaint rested upon the theory attributed to it by the court of appeals, the court should have affirmed the district court's dismissal of the action, for want of jurisdiction.

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variety of questions concerning the interpretation of the contract that would implicate federal rather than state policies. For instance, such questions might require application of Labor Department regulations and determinations relating to such matters as the various classes of laborers and mechanics identified in the applicable wage determination and the circumstances in which the workers are considered to be "employed * * * directly on the site of the work" (40 U.S.C. 276a-1). It may well be that these questions should be considered in federal, rather than state courts.

[10] Section 2 of the Act of October 21, 1976, Pub. L. 94-574, 90 Stat. 2721, amended 28 U.S.C. 1331 prospectively to eliminate that requirement in any action "brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity."

[11] In particular, the complaint does not allege that there are fewer than 500 members in the class.

2. Only the alternative reading of the vague allegations of the complaint, *i.e.*, that in fact the contract omitted any provision for payment of prevailing wages and that its failure to include such a provision violated the Davis Bacon Act, raises any issue concerning an implied right of action under that Act. So read, the complaint in essence challenges the correctness of the contracting agency's determination that the work to be performed under the contract is not construction work of the kind covered by the Davis Bacon Act (see note 1, *supra*), and it seeks *de novo* judicial review of that determination. In our view, such review is not available in an action brought by an employee for back wages for work already performed.[12] We believe that there is no implied right of action in favor of such an employee under the Act.[13]

The factors relevant in determining whether a private remedy is implicit in a federal statute that does not expressly provide such a remedy were set forth

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[12] Since this contract prohibits the performance of construction work by the contractor's employees, respondent would have had no interest in seeking such review before the work was performed. A prior determination that the work to be performed was covered by the Davis Bacon Act would simply have meant that the work would be performed by a subcontractor's employee rather than by respondent.

[13] There are a number of other statutes that require the payment of prevailing wages in government-funded contracts but do not provide any remedy similar to the suit on the "Miller Act" bond available under the Davis Bacon Act. See statutes cited at 29 C.F.R. Part I, Appendix A. We express no view on whether those statutes may be enforced by private suits.

by this Court in *Cort* v. *Ash*, 422 U.S. 66, 78 (emphasis in original):

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted * * * that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or deny one? * * * Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? * * * And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? [14]

We analyze each of these factors, as they apply to this case, in turn.

a. Both the language of the Davis Bacon Act and its legislative history indicate that laborers and mechanics on federal construction contracts are the "especial" intended beneficiaries of the statute. The committee reports on the Act explain: "The purpose of this measure is to require contractors and subcontractors * * * to pay their employees the prevailing wage rates when such wage rates have been established by private industry." S. Rep. No. 1445, 71st Cong., 3d Sess. 1 (1931); H. R. Rep. No. 2453, 71st Cong., 3d Sess. 1 (1931). In 1935, the Act was amended to provide the enforcement provisions codified in 40 U.S.C. 276a-1 and 276a-2 after a Senate subcommittee reported that "unscrupulous contractors have taken advantage of the wide-spread unemployment among the buildings crafts to exploit labor and to deprive employees of the wages to which they were entitled under the law." H. R. Rep. No. 1756, 74th Cong., 1st Sess. 1 (1935). See also S. Rep. No. 1155, 74th Cong., 1st Sess. 1-2 (1935). In 1964, the Act was further amended to require the Department of Labor to consider fringe benefits in determining the level of prevailing wages. The Senate Report on the proposed amendment states (S. Rep. No. 963, 88th Cong., 2d Sess. 2 (1964)):

> Almost from the inception of Federal construction activity Congress recognized the necessity for providing basic wage protection to local laborers and mechanics employed on the construction. It was precisely for the purpose of providing this protection that Congress passed the Davis-Bacon Act more than 30 years ago.

In *United States* v. *Binghamton Construction Co.*, 347 U.S. 171, 178, moreover, this Court noted: "[o]n its face, the Act is a minimum wage law designed for the benefit of construction workers."

Petitioner correctly notes (Pet. 10) that laborers and mechanics are not the sole intended beneficiaries of the Davis Bacon Act. The Act has the correlative purposes of providing equality of opportunity for local contractors, protecting prevailing living standards of all local craftsmen, and preventing disturbance of the local economy. See H. R. Rep. No. 308, 88th Cong., 1st

[14] These criteria have since been applied by this Court in *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462, and *Piper* v. *Chris-Craft Industries*, 430 U.S. 1.

Sess. 2 (1963); S. Rep. No. 963, *supra*, at p. 2. However, since these purposes were to be accomplished by "providing basic wage protection to local laborers and mechanics" (S. Rep. No. 963, *supra*, at p. 2), they are not inconsistent with the conclusion that laborers and mechanics are the especial intended beneficiaries of the Act.

Nevertheless, as this Court emphasized in *Securities Investors Protection* v. *Barbour*, 421 U.S. 412, the finding that the primary congressional purpose in enacting the relevant statute was the protection of the plaintiff class is not alone sufficient to raise the implication that Congress intended to grant the members of that class a private right of action. See also *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 457-458.

b. The Davis Bacon Act contains a number of enforcement provisions, including the specific remedy, which may be invoked by laborers and mechanics such as respondent, of a suit on the "Miller Act" bond required for construction contracts (see pp. 3-5, *supra*). When a statute creates a right and expressly provides a particular remedy or remedies for the enforcement of that right, an appropriate presumption is that the legislature did not intend the implication of other remedies—*expressio unius est exclusio alterius*. See, *e.g.*, *United States* v. *Babcock*, 250 U.S. 328, 331; *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 301; *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 720; *Brown* v. *General Services Administration*, 425 U.S. 820, 834-835.

While such a presumption "must yield to clear contrary evidence of legislative intent" (*National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, *supra*, 414 U.S. at 458), we have been unable to find such evidence in the legislative history of the Davis Bacon Act or its related statutes.

Instead, the legislative history of the 1964 amendments to the Davis Bacon Act strongly indicates that Congress did not believe the Act then granted any implied right of private action for unpaid wages by employees against employers. As petitioner points out (Pet. 18-19), while the amendments were under consideration, Congressman Goodell proposed a bill, H. R. 9590, 88th Cong., 2d Sess. (1964), which would have amended the Act to provide, *inter alia*, precisely such a private right of action (see Pet. App. H, p. A37). Congressman Goodell sought to have the substance of H. R. 9590 considered in the House debate on H.R. 6041, 88th Cong., 1st Sess. (1964), the bill to amend the Act by defining prevailing wages to include fringe benefits. After extensive debate concerning whether the Davis Bacon Act should provide for judicial review of coverage determinations, the House voted to invoke the parliamentary rule against nongermane amendments, and it refused to consider Congressman Goodell's proposed amendments. 110 Cong. Rec. 1194-1204 (1964). Mr. Goodell then introduced an amendment to provide for judicial review of fringe benefit determinations, and this amendment was defeated. 110 Cong. Rec. 1227-1228 (1964).

The court of appeals rejected petitioner's reliance upon the fate of the Goodell bill (H. R. 9590), mistakenly asserting that the bill "dealt with the narrow issue of judicial review of the Secretary of Labor's determination of prevailing fringe benefits" (Pet. App. B, p. A9; see Pet. App. H, pp. A34-A38). Petitioner, on the other hand, places too much reliance on the Goodell bill when it asserts (Pet. 20) that "[t]he fact that these proposed amendments were rejected by the Congress is compelling evidence that the Seventh Circuit erred." Since H. R. 9590 was never reported out of committee, and the substituted amendment was limited to fringe benefit determinations, Congress did not expressly reject a private action in favor of employees for unpaid wages. However, the invocation of the non-germane rule, which had the purpose of excluding consideration of the merits of H.R. 9590, reflects a conscious decision by House members not to include in the 1964 amendments a provision for judicial review and enforcement by persons either "aggrieved by a wage determination" (Pet. App. H, p. A34) or aggrieved by a contractor's failure to pay "the wages he is required to pay by reason of a wage determination" (Pet. App. H, p. A36).

More significant than the House action itself, however, is the fact that the members participating in the debate preceding the invocation of the non-germane rule stated explicitly their belief that the Davis Bacon Act contemplated no judicial review of agency decisions implementing the Act. The belief necessarily implies that there is no private right of

action by employees to enforce the Act. The disagreement among the participants in the debate was solely over whether the Act should be amended to permit judicial review. See 110 Cong. Rec. 1194-1204 (1964). Congress declined to add such an amendment either then or later. This consideration strongly counsels against judicial creation of a private right of action by implication.

The court of appeals nevertheless found an implied private right of action for the benefit of laborers and mechanics by reading the Davis Bacon Act *in pari materia* with the Portal-to-Portal Act of 1947, 61 Stat. 84, as amended, 29 U.S.C. 251 *et seq.* (Pet. App. B, pp. A1-A10; Pet. App. E, pp. A19-A20). The court particularly relied upon 29 U.S.C. 255, which imposes a two-year limitation on any cause of action for "unpaid minimum wages, unpaid overtime compensation, or liquidated damages" under the Fair Labor Standards Act, the Walsh-Healey Act, or the Davis Beacon Act. Since the Miller Act imposes a one-year limitation on all suits on the contractor's bond (40 U.S.C. 270b(b)), the court reasoned that "[u]nless the Portal-to-Portal two year statute of limitations on Davis-Bacon actions is a nullity," Congress must have contemplated direct suits by employees against their employers to enforce the provisions of the Davis Bacon Act (Pet. App. B, p. A10).[16]

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[16] The court did not suggest any reason why Congress would have intended that, with the possibility of direct access to the courts under the longer statute of limitations in the Portal-to-Portal Act, "by perverse operation of a type of Gresham's

We submit, however, that the court of appeals read too much into the Portal-to-Portal Act. The limitations provision of that Act was not subjected to extensive legislative scrutiny at the time of enactment, and the reference to the Walsh-Healey and Davis Bacon Acts was itself an afterthought. When Congress enacted the Portal-to-Portal Act, it was primarily concerned with curtailing the flood of suits then being brought under the Fair Labor Standards Act after this Court's decision in *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680. See *United States* v. *Unexcelled Chemical Corp.*, 196 F. 2d 264, 268-269 (C.A. 3). The Senate Bill (S. 70) would have amended only the Fair Labor Standards Act "'to exempt employers from liability for portal-to-portal wages.'" S. Rep. No. 37, 80th Cong., 1st Sess. 1, 48 (1947). The House Bill (H. R. 2157) included the Davis Bacon Act and the Walsh-Healey Act; the committee report explained (H. R. Rep. No. 71, 80th Cong., 1st Sess. 5 (1947)):

> The Walsh-Healey Act also concerns itself in its field with minimum wages and overtime compensation. The Bacon-Davis Act has provisions relating to minimum wages and other conditions of employment. These two acts are therefore affected by the Mount Clemens decision. The situation described herein as to the Fair Labor Standards Act applies to that existing under the

laws [40 U.S.C. 276a-2(a)], with its rigorous administrative exhaustion requirements and time limitations, would be driven out of currency" (*Brown* v. *General Services Administration*, *supra*, 425 U.S. at 833).

> Walsh-Healey Act and the Bacon-Davis Act. The same necessity exists there for remedial legislation.

H. R. 2157, 80th Cong., 1st Sess. (1947), contained a one-year statute of limitations, and thus was consistent with the enforcement provisions of the Davis Bacon Act. See 40 U.S.C. 270b(b) and 276a-2(b); H. R. Rep. No. 71, *supra*, at p. 7. In contrast, S. 70, 80th Cong., 1st Sess. (1947), provided for a two-year statute of limitations (S. Rep. No. 37, *supra*, at p. 48). Although the Senate Committee Report on H. R. 2157 agreed to the expanded coverage of the House Bill, it retained the two-year limitation of S. 70. See S. Rep. No. 48, 80th Cong., 1st Sess. 50-51 (1947). The two-year limitation was recommended by the conference committee (H. R. Rep. No. 326, 80th Cong., 1st Sess. 13-24 (1947)) and was enacted (Pub. L. 49, 61 Stat. 68).

There is no evidence that Congress recognized that the new statute created two incompatible periods of limitation under the Davis Bacon Act. To the contrary, it appears that Congress proceeded upon the erroneous premise that "there is no limitation provision in either the Walsh-Healey or the Bacon Davis Acts." S. Rep. No. 48, *supra*, at p. 42. The amendment to the Portal-to-Portal Act was intended simply to correct this asserted deficiency by "setting up a 2-year statute of limitations." *Id.* at 51.[16] This legis-

[16] The Senate debates on the House Bill demonstrate the same unfamiliarity with the Davis Bacon Act. 93 Cong. Rec. 2083 (1947) (Statement of Senator Wiley). Senator Donnell, a subcommittee member, indicated that he did not recall that

lative history lends no support to the conclusion of the court below that Congress assumed the existence of an implied private cause of action to enforce the Davis Bacon Act. It indicates instead that Congress thought that, consistent with the purpose of the Portal-to-Portal Act, it was preventing the bringing of stale suits under existing explicit statutory provisions.

It would, in any event, have been surprising if Congress had assumed the existence of an implied private cause of action under the Davis Bacon Act. That Act's explicit private enforcement provisions incorporated those of the Miller Act (see p. 5, *supra*). The Miller Act in turn derived from the Heard Act (Act of August 13, 1894, 28 Stat. 278). At the time the Miller Act was adopted, the statutory action on

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the Davis Bacon Act had been mentioned in the Senate subcommittee hearings on the legislation. 93 Cong. Rec. 2124 (1947); see also 93 Cong. Rec. 2250, 2253 (1947) (remarks of Senator McGrath). However, the Senate subcommittee agreed with the House subcommittee that the Davis Bacon Act and the Walsh-Healey Act should be included in the Portal-to-Portal Act, as explained by Senator Wherry, "for the simple reason that [they] involve payments for hours worked." 93 Cong. Rec. 2193 (1947).

During the debates, Senator McGrath argued that even a two-year period of limitation was too short, because "the administrative [claim] procedures which are necessary to determine the validity of the workman's claim for back wages under the Davis Bacon Act frequently take a considerable length of time which may very easily run for a period of more than 2 years." 93 Cong. Rec. 2252 (1947). Senator McGrath's statement is significant because it indicates that the limitation in the Portal-to-Portal Act was intended to apply to the explicit statutory remedy provided in the Davis Bacon Act.

the required bond had been held to be the exclusive means of enforcing the Heard Act. See *United States to Use of Zambetti* v. *American Fence Construction Co.*, 15 F. 2d 450 (C.A. 2); *United States* v. *Montgomery Heating & Ventilating Co.*, 255 Fed. 683 (C.A 5); *Strong* v. *American Fence Construction Co.*, 245 N.Y. 48, 156 N.E. 92.[17] After the enactment of the Portal-to-Portal Act, the Miller Act also was so construed. See *Harry F. Ortlip Co. of Pennsylvania* v. *Alvey Ferguson Co.*, 223 F. Supp. 893, 894 (E.D. Pa.); *Gallagher & Speck, Inc.* v. *Ford Motor Co.*, 226 F. 2d 728, 731 (C.A. 7).[18] There is no apparent rea-

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[17] In the latter case, Judge Cardozo stated (245 N.Y. at 52):

> Congress has said that contractors shall be liable to materialmen and laborers in an amount to be made determinate by the giving of the bond. The statutory liability, which in turn is inseparably linked to the statutory remedy, assumes the existence of a bond as an indispensable condition. Till then, there is neither Federal justification nor any right of action that can rest upon the statute.

[18] These decisions merit consideration here because of the parallelism between the Miller and Davis Bacon Acts. The Miller Act requires the contractor to furnish a bond for the benefit of laborers and materialmen on government construction contracts exceeding $2,000, while the Davis Bacon Act sets the minimum wages that the contractors may pay to laborers and mechanics under such contracts. Compare 40 U.S.C. 270a with 40 U.S.C. 276a. The remedy under either Act is the action on the bond provided by 40 U.S.C. 270b (see 40 U.S.C. 276a-2(b)). If a private right of action in favor of laborers and materialmen cannot be inferred from the obligations imposed on contractors under 40 U.S.C. 270a, there is no reason to infer a similar private right of action in favor of laborers

son why Congress would have disagreed with this consistent line of cases, much less why it should have expressed its disagreement covertly in the subtle manner attributed to it by the court of appeals.[19]

c. The Davis Bacon Act requires the contracting agency to include, in the specifications for federal construction contracts, the Secretary of Labor's determination of the prevailing wages for construction workers on similar projects at the locality involved, and to incorporate into the contracts based on these specifications a stipulation that the contractor will pay at least those wages to all mechanics and laborers employed on the site. 40 U.S.C. 276a. The contract must also permit the contracting officer to withhold from the amount due the contractor any amount necessary to assure that such laborers and mechanics are paid at the prevailing rates (*ibid.*). If the amount withheld is insufficient, the laborers and mechanics are granted the explicit right to sue on the payment bond required by the Miller Act (40 U.S.C. 270a) to recover the pre-

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and mechanics from the obligations imposed under 40 U.S.C. 276a, especially since the same facts that render a contract subject to one Act also render it subject to the other (see Pet. App. E, p. A16).

[19] When Congress intended to permit private suits by employees to enforce federal statutory requirements concerning working conditions, it knew how to do so explicitly. See, 29 U.S.C. 216 (Fair Labor Standards Act). The failure to include such an explicit provision in the Davis Bacon Act thus is itself evidence that no such right should be implied. See *Willis* v. *E. I. Du Pont de Nemours & Co.*, 76 F. Supp. 1010 (E. D. Okla.), reversed on other grounds, 171 F. 2d 51 (C.A. 10).

vailing wage specified in the government contract (40 U.S.C. 276a-2(b)).[20]

The Davis Bacon Act thus not only specifies the obligation of the contracting agency and the contractor but also describes the means available to the employee for assuring that he receives the benefits of the Act. By requiring the inclusion of the wage determinations in the specifications, the Act apparently contemplates adjudication of disputes only at the pre-bid stage of procurement activities.[21] Thereafter, the required clauses are included in the contracts and, if the contractor fails to perform his contract obligations, remedies are provided. But nothing in the legislation suggests that Congress intended to permit the disruption of the performance of government contracts by suits challenging the failure to include Davis Bacon Act provisions in the contracts or alleging that incorrect coverage determinations have been made.[22]

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[20] Neither the statute nor the regulations promulgated thereunder provide any administrative remedy in favor of an employee who has been injured by the failure to include the prevailing-wage provisions in a contract.

[21] Unions have been granted standing to challenge the failure to include appropriate prevailing wage determinations in specifications soliciting bids for government contracts. See, *e.g.*, *International Union of Operating Engineers, Local 627* v. *Arthurs*, 355 F. Supp. 7 (W.D. Okla.), affirmed, 480 F. 2d 603 (C.A. 10); *North Georgia Building & Construction Trades Council* v. *United States Department of Transportation*, 399 F. Supp. 58, 63 (N.D. Ga.).

[22] As petitioner points out (Pet. 20-21), Congress clearly intended to preclude judicial review of the Secretary's determinations of prevailing wages. See also *United States* v. *Binghamton Construction Co.*, 347 U.S. 171, 177.

Because of the complexity involved in classifying work entailing the performance of a large number of highly specialized tasks, which cannot be readily categorized as either construction or nonconstruction work under traditional criteria (for example, construction workers and regular maintenance workers may perform the same task interchangeably), and in order to afford a degree of certainty in the contracting process, ERDA, which was a principal government contracting agency,[23] had developed detailed guidelines for determining what work constitutes construction work with in the meaning the Davis Bacon Act. These guidelines, as approved by the Department of Labor, are published in the Federal Register (see note 4, *supra*) and applied by special committees at the contract site.[24]

Permitting a suit by an employee after the contract has been let, and thereby substituting the many federal district courts for the contracting agency as the maker of work-coverage decisions, would substantially disrupt the federal procurement process. The disruption would be most dramatic, of course, if injunctive relief were sought, but it would also be pervasive even where, as here, the claim is simply

[23] When its functions were transferred to the Department of Energy, ERDA had more than 30 contracts for the operation of complex research, development and production facilities. Ten of these contracts involved total obligations since inception of more than one billion dollars each; fifteen involved obligations of between $100 million and $1 billion each.

[24] The Department of Energy reports that ERDA made more than 5,000 coverage decisions under these guidelines in the year before its functions were assumed by the Department.

for wages due for work already performed. For example, if the district court should conclude that respondent was entitled to be paid at the prevailing wage rate for construction workers because he was performing construction work, the contractor and the government must either reclassify similar jobs for the future or face the continued accrual of potential liability for back wages. In turn, reclassification by implication might suggest the necessity for substantial alteration of the coverage guidelines, which would entail very difficult decisions about what work is sufficiently similar to that performed by respondent to require reclassification.[25] Moreover, opening the provisions of existing contracts to judicial scrutiny for compliance with the Davis Bacon Act inevitably will subject the contractors to jurisdictional disputes between unions that represent construction workers and those that represent maintenance or other nonconstruction workers.

Federal budgeting is adversely affected by a determination, after a cost-plus contract has been let, that the higher construction wages must be paid even though such wages were not contemplated when the contract was let.[26] Fixed-price procurement also would

[25] These coverage decisions themselves would be subject to review in other suits, with all the possibilities for conflicting decisions that such review implies. At best, the courts and the agency would be faced with the task of harmonizing a proliferating number of decisions dealing with infinitely varying facts.

[26] Such a determination could easily result in a substantial cost overrun in an operating contract of the size of the one involved here. See note 23, *supra*.

be adversely affected by the possibility of such a determination. The possibility of post-contracting challenges, with the concomitant potential for delays in performance due to court suits, injunctions, and efforts to reach administrative settlements, would significantly increase a bidder's uncertainty about what it would cost to perform the contract. This might discourage potential bidders from competing for government contracts and force higher bids to reflect the possibility of increased costs.

In sum, any implication of a right of action for employees beyond that expressly granted in the Davis Bacon Act can only be at the expense of the efficiency of the government procurement process. The rights explicitly granted in the Davis Bacon Act represent the balance between competing goals that has been struck by Congress. Significant alterations in that balance necessarily would be inconsistent with the scheme Congress has established.

d. The final consideration identified in *Cort* v. *Ash*, *supra*, 422 U.S. at 78, is whether the cause of action asserted is "one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law." An action for the breach of an employment contract is an action traditionally relegated to state law, and we believe, as the district court suggested (Pet. App. F, pp. A26-A27), that the failure to pay mechanics and laborers the prevailing wages required by the terms of a government construction contract could be challenged under state law

by the employees as third-party beneficiaries of the contract (see pp. 9-12, *supra*). But a suit challenging the failure to include a prevailing-wage provision in a contract requires a determination of the scope of the coverage of the Davis Bacon Act, and thereby implicates matters of federal rather than state policy. The precise scope of the congressional directive concerning the wages to be paid workers on federal contracts is not "one traditionally relegated to state law." The state courts evidently agree, for they have consistently declined to take jurisdiction over suits by laborers or mechanics to recover back wages pursuant to the remedies afforded by the Davis Bacon or Miller Acts. See, *e.g.*, *Ybanez* v. *Anchor Constructors, Inc.*, 489 S.W. 2d 730, 738-739 (Texas Ct. of Civ. App.); *Davis* v. *Hardaway Contracting Co.*, 386 S.W. 2d 707 (Ark. Sup. Ct.); *Kelly* v. *Grimshaw*, 161 Kan. 253, 167 P. 2d 627; *A. W. Kutsche & Co.* v. *Keith*, 88 S.W. 2d 454 (Tenn. Sup. Ct.).

In sum, we conclude that two of the four criteria set forth in *Cort* v. *Ash* are met here—*i.e.*, the plaintiff is one of the class for whose "especial" benefit the statute created a federal right, and federal, rather than state, law should control the assertion of that right. However, we do not believe that the remaining two criteria are satisfied: there are significant indications of a legislative intent to make the remedies provided by 40 U.S.C. 276a-2 exclusive, and a private right of action in favor of employees against employers where no wage determination is in the contract would be inconsistent with the legislative

scheme. Accordingly, we believe that if there is a need for a private enforcement action under the Davis Bacon Act, it should be supplied by the Congress and not by the courts."

* * * * *

Because of its significance for federal procurement, the question whether the Davis Bacon Act confers a right of action upon an employee who wishes to challenge the absence of a prevailing wage provision in his employer's contract with the government is an important question of federal law that this Court should decide in an appropriate case. However, it does not appear that that question may fairly be said to be presented by this case; at a minimum, the present posture of the case seems to make it an inappropriate vehicle for the Court's consideration of that question.

Since the decision of the court of appeals was based upon the understanding that respondent sought only to enforce existing provisions of petitioner's contract with the government, that decision stands merely for the proposition that an employee may bring an action for wages that his employer agreed to pay under its contract with the government. We do not here quarrel with that proposition although, as we have indicated

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[27] From the time the statute was enacted in 1931, no court has held that a private cause of action for prevailing wages can be asserted under the Davis Bacon Act when the contract does not contain a provision requiring payment of such wages. Even the court below did not so hold, for it assumed the contract contained such a provision.

(pp. 9-12, *supra*), this particular action appears to be one over which the federal courts have no jurisdiction.[28]

The decision below thus leaves it open to petitioner, upon remand to the district court, to offer its contract into evidence and thereby disprove what both courts below understood to be the factual predicate of respondent's suit (see, p. 10, *supra;* Pet. App. F, A24). Since respondent himself has characterized his complaint as resting upon the claim that the contract requires payment of the prevailing wage (Ct. App. Br. 2), we assume that petitioner would be entitled to summary judgment once the contract is presented to the district court. There seems little reason for this Court to undertake plenary review of the court of appeals' interlocutory decision in these circumstances.

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[28] Reversal by this Court on jurisdictional grounds would have the advantage of eliminating any suggestion that this Court approves the broad and unnecessary discussion below concerning whether the Davis Bacon Act confers a right of action generally. Petitioner has not, however, suggested disposition on the jurisdictional grounds we have discussed herein.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1977.

APPENDIX A

The contract at issue in this case contained the following clauses during the time respondent was a contractor employee [1]:

26.5 *Davis Bacon and Other Labor Provisions for Construction Subcontracts.*

The University and the Commission have agreed upon a procedure under which the Commission will determine when work to be undertaken at the Laboratory Facilities is covered by the Davis-Bacon Act. When it is determined that the Davis-Bacon Act does cover a particular work project, the University shall procure by subcontract the covered work. Any subcontract entered into under this section shall contain the provisions relative to labor and wages required by law to be included in contracts for the construction, alteration and/or repair, including painting and decorating, of a public building or public work. When requested by the Commission, any such subcontract shall be submitted for Commission approval.

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Supplement No. 16, Appendix D.

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D. *Performance of Construction Work*

The University, by engaging subcontractors, will undertake the performance of the following types of construction work:

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[1] Similar or identical clauses are included in the current contract.

1. Work estimated to cost less than $100,000 to be performed at the Du Page County site; [2]
2. Work which, because of its relationship to Laboratory operations, requires unusual safety precautions, extensive security arrangements, or close scheduling to avoid interference with normal activities;
3. Work involving installation of equipment in unique developmental facilities such as reactor experiments and major accelerators, where such work is not included in a general construction contract; and
4. Other work, where the University and the Commission agree that the University shall perform the work.

In situations not covered by items 1 through 4, the Commission will enter into prime contracts for the performance of the construction work. The determination of whether any particular project falls within category 2 or 3 and whether there shall be a change from the normal division of work on any particular project, shall be made by agreement between the University and the Commission.

When the Commission enters into prime contracts for work involving the Laboratory facilities, the Laboratory Organization normally will perform various services to help assure proper performance by the contractor. The University and the Commission will develop for each job

[2] This subsection was amended effective February 15, 1972, to refer to: "General Plant Projects estimated to cost less than $250,000.00 and other work estimated to cost less than $100,000.00."

the procedures to be employed by Laboratory, Commission and other interested parties with reference to construction work for Laboratory facilities.

The University will develop and utilize procedures for the selection of cost-type construction subcontractors which will be in accord with Commission policies.

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